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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARANA 670 HOLDINGS, LLC, an Arizona limited liability company, Appellant, v. SPIRIT UNDERGROUND, LLC, a Nevada limited liability company, Appellee.	2 CA-CV 2011-0136 2 CA-CV 2012-0026 (Consolidated) DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. C20081383, C20082605, C20083133, and C20085285 (Consolidated)

Honorable Stephen C. Villarreal, Judge

AFFIRMED

Fennemore Craig, P.C.
By Timothy Berg, Patrick Irvine, John Randall Jefferies, Theresa Dwyer-Federhar, and Meredith K. Marder
Phoenix
Attorneys for Appellant

Bluff & Associates
By Guy W. Bluff
Phoenix
Attorneys for Appellee

E C K E R S T R O M, Presiding Judge.

¶1 This case, in the words of the appellant, involves "complex construction litigation" stemming from a "failed residential subdivision project." Appellant Marana 670 Holdings, LLC (hereafter "Marana"), which is the assignee of the developer Saguaro Reserve, LLC ("Saguaro"), challenges the trial court's grant of partial summary judgment in favor of the contractor/appellee Spirit Underground, LLC ("Spirit"), on its claims arising under the Prompt Pay Act (PPA), A.R.S. §§ 32-1129 through 32-1129.07. On appeal, Marana argues the court erred in interpreting and applying the PPA, specifically § 32-1129.01.[1] Marana also contends disputed factual issues prevented the entry of summary judgment. Finding no error, we affirm.

Factual and Procedural Background

¶2 We view the facts relevant to this appeal in the light most favorable to Marana, the party against whom summary judgment was entered. *See Delmastro & Eells v. Taco Bell Corp.*, 228 Ariz. 134, ¶ 2, 263 P.3d 683, 685-86 (App. 2011). In 2005 and 2006, Saguaro entered into several construction contracts with Spirit to develop land owned by Saguaro. In late 2007 through early 2008, Spirit sent Saguaro several "payment applications," which also are known as "billings" under the PPA, seeking compensation for the work Spirit had performed under the contracts. Saguaro neither paid nor responded to Spirit's billings.

¶3 In the litigation that followed, Spirit sought summary judgment on its claims against Saguaro under the PPA. In Spirit's motion, it alleged that because

[1]Throughout our decision, we cite the version of § 32-1129.01 found in 2000 Ariz. Sess. Laws, ch. 233, § 4.

Saguaro had failed to timely object to the billings, they were "deemed approved and certified" by operation of § 32-1129.01(D). In its response and cross-motion for summary judgment, Saguaro separated Spirit's billings into different groups and claimed, *inter alia*, that because the billings in one group did not conform to the "billing procedures" specified in the parties' contracts, they required no objection and were not deemed approved under the statute. Saguaro also argued that a second group of billings seeking "retention amounts"—that is, funds that had been withheld "to ensure work [wa]s completed in accordance with the terms of th[e] agreement[s]"—was not governed by § 32-1129.01(D). Instead, Saguaro maintained this second group of billings had been properly disregarded because Spirit had not completed all work under the contracts.

¶4 The trial court determined that § 32-1129.01(D) applied to both groups of billings. It found Saguaro had failed to respond to or pay the billings as required by law. The court therefore granted partial summary judgment in favor of Spirit on its claims under the PPA.[2] Marana subsequently obtained Saguaro's rights and was substituted for Saguaro on the claims relevant to this appeal. The court then entered a final judgment in favor of Spirit pursuant to Rule 54(b), Ariz. R. Civ. P. Marana's timely appeal followed.

Prompt Pay Act

Billing Procedures

¶5 As noted above, the trial court granted partial summary judgment in favor of Spirit because Saguaro did not respond to any of Spirit's billings within the fourteen-

[2]The trial court denied Spirit relief and granted partial summary judgment in favor of Saguaro as to a third group of billings that the court determined never had been submitted to Saguaro. This aspect of the court's ruling is not before us on appeal.

day period specified in § 32-1129.01(D). Marana contends Saguaro was not required to respond to the billings because they were not signed by a job superintendent and were submitted without approved change orders. These defects, according to Marana, made the billings noncompliant with the parties' construction contracts and ineffective under § 32-1129.01(I). That subsection provides: "Payment shall not be required pursuant to this section unless the contractor provides the owner with a billing or estimate for the work performed or the material supplied in accordance with the terms of the construction contract between the parties." *Id.*

¶6 Spirit counters that even if we assume *arguendo* the parties' contracts required a payment application to include an attached change order or a signature, a billing does not need to comply strictly with every term and condition of a contract before an owner is obligated to respond to a request for payment. The trial court implicitly accepted this argument. It concluded that "when an owner receives a billing that does not conform to the billing requirements of the contract between the parties, the owner cannot simply ignore the submitted billing, but must still issue a written objection to the billing . . . if it intends to withhold payment." We review the court's application and interpretation of the PPA de novo. *See Ariz. Dep't of Admin. v. Cox*, 222 Ariz. 270, ¶ 5, 213 P.3d 707, 709 (App. 2009).

¶7 For construction projects lasting at least sixty days, the PPA requires that owners make periodic progress payments to contractors. § 32-1129.01(A). The process for obtaining these payments begins with a contractor submitting a "billing or estimate" to an owner. *Id.* The owner who receives the billing must either approve and pay it, *see*

id., or respond in writing specifying why the billing was disapproved. § 32-1129.01(D). A billing to which no timely response has been made is "deemed approved and certified" under the statute. *Id.*

¶8 Section 32-1129.01(D) specifies the grounds upon which an owner may disapprove a billing. It provides, in relevant part:

> An owner may decline to approve and certify a billing or estimate or portion of a billing or estimate for unsatisfactory job progress, defective construction work or materials not remedied, disputed work or materials, failure to comply with other material provisions of the construction contract, third party claims filed or reasonable evidence that a claim will be filed, failure of the contractor or a subcontractor to make timely payments for labor, equipment and materials, damage to the owner, reasonable evidence that the construction contract cannot be completed for the unpaid balance of the construction contract sum or a reasonable amount for retention.

Id. "[T]he primary purpose of the [PPA] is to require an owner to identify and disapprove those items that need to be corrected early in the process so that contractors, subcontractors, and suppliers receive prompt payment for their work." *Stonecreek Bldg. Co. v. Shure*, 216 Ariz. 36, ¶ 20, 162 P.3d 675, 679 (App. 2007). In this way, the PPA creates "a framework for ensuring timely payments from the owner to the contractor." *Id.* ¶ 16. And the PPA expressly provides that "[a] construction contract shall not alter the rights of any contractor, subcontractor or material supplier to receive prompt and timely progress payments as provided under" the act. § 32-1129.01(J).

¶9 Under that statutory scheme, to the extent Saguaro believed Spirit's billings were defective because they were unsigned or otherwise were not made in accordance

with the parties' contracts, such concerns involved a "failure to comply with [a] material provision[] of the construction contract" and necessitated a written response by Saguaro under § 32-1129.01(D). Saguaro's failure to take any action in response to the billings therefore violated the payment protocol set forth in the PPA, as the trial court correctly concluded. Notably, any other interpretation of § 32-1129.01(D) would undermine the framework of requiring owners to pay upon request or state their objections to so doing in a timely fashion.

¶10 Marana insists this interpretation of § 32-1129.01(D) is flawed because it renders § 32-1129.01(I), a provision specifying when an owner need not pay for work under the PPA, meaningless or redundant. But subsection (I) merely clarifies that an owner is not required to make any payments "unless the contractor provides the owner with a billing or estimate," thus enforcing the requirement that contractors must make an adequately detailed request for payment to trigger the PPA's provisions.

¶11 Furthermore, Marana's reading would directly contradict § 32-1129.01(D), which specifically requires the owner to respond on penalty of having the request be deemed "approved and certified." Because we are confident the legislature did not intend to contradict one subsection with another, and thereby render the PPA a nullity, we instead read the various clauses of subsection (I) as merely explaining the type of work and material for which a "billing or estimate" must be rendered before a request for payment may trigger the statutory scheme. *See In re Maricopa Cnty. Juv. Action No. JS-5894*, 145 Ariz. 405, 410, 701 P.2d 1213, 1218 (App. 1985) (part of statute must be

interpreted in light of entire statutory scheme to carry out legislative intent manifested therein).

¶12 Marana suggests, however, that we can read the two subsections of § 32-1129.01 in harmony if we view subsection (D) as addressing the billing protocol when a contractor has failed to comply with a material provision of the parties' contract, and we read subsection (I) as requiring compliance with any contractual billing procedures, "however ministerial they might be" and regardless of whether "courts or parties . . . view [them] as . . . material." But we are skeptical the legislature intended to relieve an owner of any duty to pay only when the grievance with the bill was comparatively trivial—yet enforce payment upon nonresponse when the dispute was substantial.

¶13 Moreover, any noncompliance with a contractual term that might serve as a defense to a claim under the PPA would be "material" under § 32-1129.01(D). In general, "an issue is material if the facts alleged are such as to constitute a legal defense." *Northen v. Elledge*, 72 Ariz. 166, 170, 232 P.2d 111, 113-14 (1951). A "material term[]" of a contract is any provision dealing with a "significant issue[]" such as "payment terms." *Black's Law Dictionary* 991-92 (7th ed. 1999). Thus, if an owner believes that a contractor's failure to comply with a contractual billing procedure has relieved the owner of his or her statutory obligation either to respond to or pay a billing, this failure by the contractor concerns a "material provision[]" of a contract under § 32-1129.01(D), and it requires a response by the owner. The "materiality" distinction Marana posits between billing requirements and workmanship finds no support in either logic or the language of the respective subsections.

¶14 Marana also raises a slippery-slope objection to the trial court's interpretation of the PPA: "[T]o hold that *any* payment application—however incomplete, inaccurate, or non-conforming—will be automatically deemed approved merely by an owner's failure to act within fourteen days offends principles of fundamental fairness and the spirit of the PPA." But this argument overlooks that under the PPA the owner need only articulate any objections to a payment application in a timely fashion to avoid any unfairness, and compelling such a response is the very thrust and spirit of the PPA. Although we can imagine extreme cases in which a request for payment is so deficient it cannot be characterized as a "billing or estimate" under subsection (I), we are not presented with such a scenario here. *Cf. Delmastro*, 228 Ariz. 134, ¶ 17, 263 P.3d at 690 (recognizing insufficiency of notice, as opposed to inaccuracy, would affect owner's disclosure obligations under mechanic's lien statute). We thus find no error in the trial court's ruling.

Retention

¶15 Marana next argues the trial court erred in granting summary judgment on the billings that requested the release of retention funds. As Saguaro argued below, Marana claims the release of retention is governed exclusively by § 32-1129.01(H); thus, Marana contends the court erred in awarding retention payments based on Saguaro's failure to respond under subsection (D) of the statute.

¶16 At the time the billings were made, § 32-1129.01(H) provided:[3]

> When a contractor completes and an owner approves and certifies all work under a construction contract, the owner shall make payment in full on the construction contract within seven days. When a contractor completes and an owner approves and certifies all work under a portion of a construction contract for which the contract states a separate price, the owner shall make payment in full on that portion of the construction contract within seven days. On projects that require a federal agency's final approval or certification, the owner shall make payment in full on the construction contract within seven days of the federal agency's final approval or certification.

¶17 Under Marana's interpretation of this subsection, all work must be completed, approved, and certified by an owner before the owner is required to pay a retention amount. And under Marana's view—at least for cases such as this one, where federal agency approval is not required—the statute fails to specify a mechanism by which a contractor may both signal that work has been completed and prompt an owner to approve and certify the work at the end of a project. Marana suggests this might be a shortcoming of the statute, but it argues that we are required nonetheless to follow the text of the statute as it is written. We find no reason to read subsection (H) in isolation, as Marana insists we must.

¶18 To the contrary, all parts of a statute relating to the same subject must be construed together, *Stuart v. Winslow Elementary Sch. Dist. No. 1*, 100 Ariz. 375, 383, 414 P.2d 976, 981 (1966), and courts strive to interpret the various subsections of a

[3]The version of the statute applicable to this case took effect in 2000. 2000 Ariz. Sess. Laws, ch. 233, § 4. The parties correctly note the legislature since has amended the PPA to define "retention" and specify procedures for final billings and the release of retained funds. 2010 Ariz. Sess. Laws, ch. 337, §§ 1-3.

statute "'as a consistent and harmonious whole.'" *Excell Agent Servs., L.L.C. v. Ariz. Dep't of Revenue*, 221 Ariz. 56, ¶ 9, 209 P.3d 1052, 1053 (App. 2008), *quoting State v. Wagstaff*, 164 Ariz. 485, 491, 794 P.2d 118, 124 (1990). "The provision in question," therefore, "must be interpreted in light of the entire statute and consideration must be given to all of the statute's provisions so as to arrive at the legislative intent manifested by the entire act." *Maricopa Cnty. No. JS-5894*, 145 Ariz. at 410, 701 P.2d at 1218.

¶19 As the trial court correctly observed here, nothing in the text of the PPA defines a "billing" so as to exclude a request for the release of a retention amount. Thus, a billing submitted at the end of a project, just like a billing submitted at the beginning of or during a project, may seek approval and payment for "work performed" and "materials supplied." § 32-1129.01(A). Furthermore, no other process is specified in subsection (H) for the "approv[al] and certifi[cation]" of work apart from the billing process set forth in subsection (D). Accordingly, we find the court correctly read these provisions in harmony.

¶20 As the trial court observed, Marana's proposed interpretation "would allow an owner to withhold final payment on a project indefinitely without any basis." A plain reading of the statute's related provisions reveals that if an owner is dissatisfied with the work at the end of a project, he or she is not without a remedy. The owner may refuse to release the "reasonable retention" amounts expressly referred to in § 32-1129.01(D) by "declin[ing] to approve and certify" the contractor's billing in a timely fashion, citing grounds of "defective construction work or materials . . . , disputed work or materials, [or] failure to comply with other material provisions of the construction contract." Thus,

the problem in this case results not from the language of the statute or the trial court's interpretation of the law, but rather from Saguaro's failure to comply with it.

Contract Termination

¶21 Finally, Marana argues that disputed issues of material fact regarding the termination of the parties' contracts precluded the entry of summary judgment.[4] Marana specifically asserts Saguaro had "terminated the construction contracts in June 2007" through a "default letter" issued that month, and it argues the trial court "usurped the jury's role" by determining otherwise. Spirit counters that this argument "was never made to the trial court" and is thus waived on appeal. We disagree.

¶22 In response to Spirit's motion for partial summary judgment below, Saguaro repeatedly emphasized the importance of the June 2007 letter. Saguaro argued

[4]We initially found this argument waived due to Marana's failure to provide supporting citations to the record required by Rule 13(a)(6), Ariz. R. Civ. App. P. In lieu of proper citations to the record as it is numbered pursuant to Rule 11(a)(2), Ariz. R. Civ. App. P., this section of Marana's opening brief refers to items within a separately filed, arbitrarily numbered appendix. Despite this defect, *see Delmastro*, 228 Ariz. 134, n.2, 263 P.3d at 686 n.2, we later granted Marana's motion for reconsideration on this issue because it pointed out that it had provided a conversion table within the appendix indicating where the items included could be found in the record on appeal. Marana also avowed it had used this citation method in "good faith" for the convenience of this court. We emphasize that by vacating our earlier decision, pursuant to Rule 22(d), Ariz. R. Civ. App. P., we are simply exercising our discretion regarding waiver in light of the facts presented in the motion; we do not approve of Marana's practice. The uniform, standard record citations afforded by Rule 11 and required by Rule 13 promote efficiency within this court, and parties are not free to disregard or modify the rules. For added convenience, parties who electronically file their briefs in Division Two of the Court of Appeals may access the electronic version of the record and provide citations to the items therein, including pin citations to electronic page numbers, if they so desire. They may also include hyperlinks for the factual and legal citations within their briefs. *See* Ariz. R. Jud. Admin. § 1-506(D)(3) ("Hyperlinks to static, textual information or documents may be included within a document solely for the convenience of judicial officers, attorneys, and pro se litigants.").

the letter had informed Spirit that it "had materially breached the contracts between them" and that Saguaro intended to use the remaining funds to pay a different contractor to complete or repair Spirit's work. Thus, Saguaro claimed, Spirit was not entitled to receive any payments for work it had performed after receiving the letter. In Spirit's reply memorandum, it characterized this as an issue of contract termination. The trial court then expressly addressed the question in its minute entry ruling, finding "[t]he letter was not adequate notice of termination and therefore did not free Saguaro from liability pursuant to the Prompt Pay Act." Because the court chose to reach the question on its merits, we deem the argument preserved for appeal. *See Payne v. Payne*, 12 Ariz. App. 434, 435, 471 P.2d 319, 320 (1970) ("[T]he general law in Arizona [is] that a party must timely present [its] legal theories to the trial court so as to give the trial court an opportunity to rule properly.").

¶23 "Summary judgment is appropriate when the pleadings and items in the record 'show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Delmastro*, 228 Ariz. 134, ¶ 7, 263 P.3d at 686-87, *quoting* Ariz. R. Civ. P. 56(c)(1). "Under this standard, 'if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense,' then summary judgment should be granted." *Id.*, *quoting Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). We review a court's grant of summary judgment de novo. *Id.* ¶ 8.

¶24 Under Arizona law, a "notice of termination must be clear, conveying an unquestionable purpose to insist upon a termination." *Shaw v. Beall*, 70 Ariz. 4, 7, 215 P.2d 233, 234 (1950). In other words, "the notice must be certain, positive and unequivocal." *Id.* at 7, 215 P.2d at 234-35. Determining whether a written instrument is unambiguous presents a question of law which we decide de novo. *See, e.g.*, *Fairway Builders, Inc. v. Malouf Towers Rental Co.*, 124 Ariz. 242, 249, 603 P.2d 513, 520 (App. 1979); *see also Realty Assocs. of Sedona v. Valley Nat'l Bank of Ariz.*, 153 Ariz. 514, 517, 738 P.2d 1121, 1124 (App. 1986).

¶25 The June 2007 letter states, in part, "[Saguaro] will use the remaining funds in [Spirit's] contracts to complete this work," and it expresses "regret that we have come to this point." But the first line of the letter also states as follows: "Please consider this letter as Saguaro Reserve's formal demand to comp[l]ete all work on the three projects we have contracted with Spirit Underground to complete." The letter adds, "We are prepared to hire a third party to complete all work associated with these projects and are currently soliciting proposals to complete that work."

¶26 This did not constitute a notice of termination that was certain, positive, and unequivocal. To the contrary, in "formal[ly]" demanding further and complete performance from Spirit, the letter was not clearly terminating the contract, and nothing in the letter conveyed to Spirit that the contract was being terminated. No reasonable jury could conclude otherwise. Rather, the letter is properly characterized as a threat to terminate in the event that Spirit did not comply with Saguaro's demands. As a result, the letter did not meet the legal standard required for an effective notice of termination.

The trial court thus correctly granted partial summary judgment on the issue as a matter of law. *Cf. Pace v. Sagebrush Sales Co.*, 114 Ariz. 271, 273-74, 560 P.2d 789, 791-92 (1977) (upholding summary judgment when "'only one finding c[ould] legally be derived from the circumstances'" regarding reasonable notice of breach), *quoting Davidson v. Wee*, 93 Ariz. 191, 200, 379 P.2d 744, 749 (1963). Marana also faults the court for "focus[ing] solely on the Default Letter" and argues the contracts could be found to have been terminated based on "the parties' communications and conduct before June 2007." This argument was not presented below, and we therefore find it waived. "On appeal from summary judgment, we will not consider new factual theories raised in an attempt to secure reversal of the trial court's determinations of law." *Schoenfelder v. Ariz. Bank*, 165 Ariz. 79, 89, 796 P.2d 881, 891 (1990); *accord Hourani v. Benson Hosp.*, 211 Ariz. 427, n.2, 122 P.3d 6, 11 n.2 (App. 2005).

¶27 Marana contends three additional factual disputes precluded summary judgment here: (1) whether certain "change orders" were approved before the commencement of work, in accordance with the parties' contracts; (2) whether Spirit failed to complete the work; and (3) whether Saguaro received Spirit's payment applications. The first two issues are not germane to Spirit's statutory claims under the PPA. For the reasons discussed in the preceding section of this decision, neither Spirit's failure to comply with a material contractual term regarding change orders nor Spirit's work being "disputed" or "unsatisfactory" would relieve Saguaro of its statutory obligation to either pay or respond to a billing in a timely fashion. *See* § 32-1129.01(D).

¶28 As to the third point regarding receipt of the billings, Marana is incorrect when it broadly asserts "the trial court . . . resolved the dispute in favor of Spirit." In fact, the court granted Saguaro partial summary judgment as to the payment applications that were supported by "no invoices" or "proof of mailing." Marana has not specified which of the disputed billings it challenges on appeal were included in the judgment granted to Spirit. Nor has Marana pointed to any admissible evidence that would create a genuine issue of fact as to whether these items were received. *See Flowers v. K-Mart Corp.*, 126 Ariz. 495, 499, 616 P.2d 955, 959 (App. 1980) (opponent of summary judgment "must show that competent evidence is available which will justify a trial on the issue"); *see also* Ariz. R. Civ. P. 56(c)(2). Given the non-specific, conclusory argument Marana presents on appeal, we find no basis for disturbing the court's summary judgment ruling. *See Adams v. Valley Nat'l Bank of Ariz.*, 139 Ariz. 340, 343, 678 P.2d 525, 528 (App. 1984) (appellate court may decline to perform attorney's role and search record to substantiate appellant's claim); *see also Gen. Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 191, 193, 836 P.2d 404, 406 (App. 1992) (judgment presumed correct, and appellant bears burden to show otherwise).

Disposition

¶29 For the foregoing reasons, the judgment is affirmed. Both parties have requested an award of attorney fees and costs incurred in this appeal pursuant to A.R.S. §§ 12-341, 12-341.01(A), 32-1129.01(M), and 32-1129.02(F).[5] Spirit's request is

[5]2001 Ariz. Sess. Laws, ch. 117, § 18.

granted, subject to its compliance with Rule 21, Ariz. R. Civ. App. P. Marana's request is denied.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.